Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

REDSTONE RESOURCES, INC.,

Petitioner,

v.

HOLME ROBERTS & OWEN, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Colorado Supreme Court denied Petitioner, Redstone Resources, Inc.'s, Writ of Certiorari, thus affirming the decision of the Colorado Court of Appeals. The Court of Appeals affirmed a decision of the District Court, Second Judicial District, City and County of Denver, Colorado. The District Court granted summary judgment against Redstone Resources, Inc. dismissing its complaint for relief on the basis that it was filed outside the statute of limitations. Petitioner appeals from that ruling.

Can the trial court grant a motion for summary judgment on the issue of the statute of limitations by making its own factual determinations regarding genuine questions of disputed material fact?

Can an attorney create the affirmative defense of the statute of limitations by actively cloaking substantive relevant information from a plaintiff's discovery request by claiming the attorney client privilege?

CORPORATE DISCLOSURE STATEMENT

Petitioner, Redstone Resources, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINION BELOW

The Denver District Court entered its Opinion on November 14, 2006. (App. B) Petitioner, Redstone Resources, Inc., filed a timely appeal. The Colorado Court of Appeals entered its Opinion on May 15, 2008. (App. A) Redstone Resources, Inc. filed its Petition for a Writ of Certiorari with the Colorado Supreme Court. The Colorado Supreme Court denied the Petition on March 30, 2009. (App. C)

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without

due process of law; nor shall private property be taken for public use, without just compensation.

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Preston Reynolds Company (PRC) formed Redstone Resources, Inc. (Redstone) in 1993. Pursuant to a management agreement between the two corporations, officers of PRC held the same officers' roles in Redstone (Dual Officers) as they did in PRC. PRC managed all of the operations of Redstone.

Redstone had no separate officers, employees, or premises. Some of the directors of PRC were also directors of Redstone. There were three independent directors of Redstone, two of whom live outside the state of Colorado.

Three of the Dual Officers received options to purchase Redstone stock at the time of its formation. The options were set to expire in October 1999. In early 1999, the officers requested that Redstone extend the stock options for another five years. The board of Redstone refused to extend the options.

During the operation of Redstone, the Dual Officers retained the law firm of Holme Roberts & Owen and Phillip Clark (collectively, HRO) to replace Clanahan Tanner as corporate counsel. Each of the law firms provided legal services to both Redstone and PRC. HRO was in contact only with the Dual Officers with respect to the legal representation. However, Redstone paid its proportionate share of the legal fees incurred by the corporations, and HRO assisted PRC in determining the amount of legal fees allocated to Redstone's account.

Although there was a potential conflict of interest between PRC and Redstone at the inception of the representation, HRO did not enter into a written fee agreement with either corporation, nor did HRO obtain conflict waivers from either corporation for its continued dual representation after a conflict arose.

HRO and the Dual Officers designed a transaction whereby Redstone would loan certain officers the money to exercise the stock options (in a notes-for-stock transaction). Only the stock purchased (and no other collateral) would secure the loans.

HRO drafted all of the documents used to complete the notes-for-stock transaction. Only one outside board member of Redstone was ever presented with the draft

documents for approval. (That director received the documents just one day before the options were to expire and while he was recovering from a stroke at the time). Neither HRO nor the Dual Officers disclosed to the Board that there was a conflict of interest between the Dual Officers and Redstone or that HRO was acting only on behalf of the Dual Officers. The board of Redstone initially authorized the notes-for-stock transaction.

At a board meeting held subsequent to the authorization of the notes-for-stock transaction, John Behrmann (Mr. Behrmann), one of the independent directors of Redstone, specifically inquired about the validity of the transaction pursuant to Colorado law. Bob Pfeiffer, Vice President and CFO of both corporations, assured Mr. Behrmann that HRO had determined the transaction complied with Colorado corporate law. Mr. Pfeiffer was asked to get that opinion in writing.

The discussion about the validity of the transaction and comments related to the legality of the transaction were eliminated from the minutes the Secretary and HRO put in the corporate record. Pfeiffer never provided a written opinion.

In fact, it was later discovered that HRO had informed Mr. E. Szaloczi, the Dual President, that the notes-for-stock transaction was prohibited under Colorado law. Colorado requires that company stock be purchased with actual consideration. Colorado law states that non-recourse notes and unsecured promissory notes (only secured by the stock obtained in the subject

transaction) do not constitute actual consideration. The officers also failed to provide the twenty-five days advance notice to the shareholders of Redstone that the Board would be considering the loans to the Dual Officers, as required by the Bylaws. Neither HRO nor Mr. Szaloczi timely revealed this information to Mr. Behrmann or the independent directors of Redstone.

In early 1999, it became apparent that management of Redstone and PRC had different business goals for the future of each company. In December 1999, the board of Redstone retained the law firm of Brega & Winters as corporate counsel and hired a separate CFO. The Board also deferred the final approval of the notes-for-stock transaction until new corporate counsel could review the documents. In December 1999, PRC gave notice that the management agreement between the two corporations would be terminated. Most of the Dual Officers resigned their positions with Redstone shortly thereafter, while retaining their offices with PRC.

In March 2000, Redstone's lender, BankOne, declared the loans it issued to be in default. BankOne based its decision on the failure of Redstone to obtain prior written consent from BankOne before making any loans (that were a part and parcel of the notes-for-stock-transaction). In April 2000, the board of Redstone, on the advice of counsel, cancelled the notes-for-stock transaction. In June 2000, Mr. Szaloczi and the other option holders sued Redstone (the Szaloczi litigation) and the independent directors in connection with the termination of the notes-for-stock- transaction.

The "Szaloczi" Litigation

During the course of the Szaloczi litigation, Redstone attempted to obtain discovery from HRO concerning the structure of the notes-for-stock transaction. Redstone had no independent source of information relating to the transaction or to any of the operations of Redstone for that matter because all of the records were maintained by PRC pursuant to the management agreement.[1]

Mr. Szaloczi and HRO vigorously resisted Redstone's attempt to obtain discovery related to the notes-for-stock transaction. At depositions of the Dual Officers, the Dual Officers were instructed by their counsel not to answer any questions concerning the legal services provided by HRO. The Dual Officers were further instructed to claim attorney client privilege. HRO also concealed their activities behind attorney client privilege by claiming it provided legal services only to PRC. HRO also affirmed it never acted as attorney for Redstone.[2]

Redstone filed a motion to compel discovery from HRO. HRO provided the trial court with affidavits alleging that all communications with HRO (relating to

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[1] Even after the termination of the management agreement, PRC retained all of the records of Redstone pertaining to the notes-for-stock transaction.

[2] PRC was not a party to the notes-for-stock transaction, so HRO apparently performed legal services related to the transaction on behalf of the Dual Officers, not PRC.

the notes-for-stock transaction) were protected by PRC's attorney client privilege.

HRO later entered its appearance on behalf of PRC in the Szaloczi litigation. Redstone filed a motion to disqualify HRO as attorneys for PRC because HRO had acted as attorney for both corporations.

Over HRO and PRC's vigorous objection, the trial court in the Szaloczi litigation eventually found that HRO had represented Redstone in connection with the notes-for-stock transaction. The court thereafter disqualified HRO and granted the motion to compel discovery on January 23, 2003.

The Denver trial court judge, L. Manzanares, commented that HRO and the Dual Officers had kept Redstone in the dark "like a mushroom" with respect to HRO's legal services for Redstone.

Redstone finally received documents from PRC and HRO at the deposition of Mr. Phillip Clark, the subject attorney, in May 2003. It was at this time that Redstone first learned the substance of HRO's communications, advice, and work in connection with the notes-for-stock transaction.

Redstone then moved to join HRO as a third-party defendant in the Szaloczi litigation. While stating it might be preferable to try the issue of HRO's liability to Redstone in a single proceeding with the Szaloczi matter, Judge Manzanares found that there was insufficient time prior to the scheduled trial date to allow joinder.

Judge Manzanares specifically noted that Redstone would suffer no prejudice by the denial, as Redstone could bring a separate action against HRO.

> I am cognizant of the fact that while had [the Lawyers] initially been brought in, it would have been preferable to try it all at once. I think that other than the fact that it *will involve a separate proceeding, there is no prejudice to Redstone in saying that if you are going to sue [the Lawyers], you need to do it in a separate action.*

Judge Manzanares returned a verdict against Redstone in the amount of $1.4 million – allegedly, the value of the options that the Dual Officers lost. Faced with a potentially ruinous judgment, Redstone filed for bankruptcy on March 12, 2004, thus tolling the statute of limitations pursuant to United States Bankruptcy Code.

Redstone brought the action underlying this Petition for Writ of Certiorari against HRO on March 10, 2006 and amended the complaint on July 10, 2006. At the time of filing the amended complaint, HRO had not filed an answer or any other responsive pleading.[3] Two days after the service of the amended complaint, HRO filed a motion for summary judgment alleging that Redstone's claims against the lawyers were barred by the applicable two-year statute of limitations. HRO never filed an answer to Redstone's complaint.

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[3] HRO's answers were initially due on or about March 30, 2006 and to the amended complaint on or before July 30, 2006.

Redstone filed a comprehensive response to the motion for summary judgment, but the response was struck by the trial court for being in excess of the page limitation contained in Colorado Rules of Civil Procedure 121 §1-15.[4] Thereafter, Redstone filed a shorter response pursuant to the court's order. HRO filed a reply alleging, for the first time in the litigation, that the knowledge of the Dual Officers should be imputed to the corporation so that Redstone knew about the claims against HRO prior to the deposition of Mr. Clark.

Redstone moved for leave to file a sur-reply to address this new issue or, in the alternative, to allow oral argument on the issue. The trial court denied both motions.

On November 14, 2006, the court determined that Redstone knew of the malpractice of HRO because Dual Officer Szaloczi (the principal wrongdoer) knew of the malpractice at the time of the original notes-for-stock transaction. In making this decision, the court relied on certain evidence submitted by HRO in its reply regarding the motion for summary judgment.

As the court had refused Redstone's request to file a sur-reply or to make oral argument, the only evidence and information before the court on this issue was that presented by HRO. Redstone had no opportunity to rebut the position taken by HRO, which now had become the central factual issue in the case, even though it was

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[4] HRO's motion for summary judgment was also in excess of the limitations of C.R.C.P. 121 §1-15, but the court did not strike it or order HRO to file a shorter document.

first raised by HRO in its reply in support of the motion for summary judgment.

Redstone timely appealed the trial court's decision to the Colorado Court of Appeals. The Court of Appeals reviewed the case *de novo* and affirmed the trial court's decision.

However, the Court of Appeals did not base its decision on the imputation of Mr. Szaloczi's knowledge to the corporation. Rather, the Court of Appeals made its own determination upon an inference of facts not in the record as follows: Redstone's independent board of directors canceled the notes-for-stock transaction in April 2000, thus the Court of Appeals found that Redstone knew that the transaction was prohibited no later than that date. Therefore, according to the Court of Appeals, Redstone knew at that time that it had claims against HRO for malpractice. The notes-for-stock transaction was cancelled to cure the primary default claimed by Redstone's lender.

As an alternative, the Court of Appeals found that Redstone knew of its claims against HRO no later than the date that it filed its counterclaims in the Szalozci litigation.

The counterclaims were not related to the option issue. They were first unearthed when Redstone hired its own people and began looking at what PRC was doing and had done while operating the business of Redstone. It was at that time, that Redstone and its directors found that the notes-for-stock transaction violated both

the letter and the spirit of Colorado law. Colorado Constitution Article XV, Section 9 states:

> No corporation shall issue stocks or bonds, except for labor done, service performed, or money or property actually received, and all fictitious increase of stock or indebtedness shall be void. The stock of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding a majority of the stock, first obtained at a meeting held after at least thirty days' notice given in pursuance of law.

In implementing the Constitutional provision, the Colorado Corporation Code, § 7-106-202, provides:

> . . . (2) Subject to the limitations set forth in subsection (5) of this section, the board of directors may authorize the issuance of shares for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, and other securities of the corporation. . . .
>
> (5) The promissory note of a subscriber or an affiliate of the subscriber for shares shall not constitute consideration for the shares unless the note is negotiable and is secured by collateral, other than the shares, having a fair market value at least equal to the principal amount of the note. For the purposes of this subsection (5), "promissory note" means a

> negotiable instrument on which there is an obligation to pay independent of collateral and does not include a nonrecourse note. . . .[5]

Redstone filed a timely Petition for Writ of Certiorari to the Colorado Supreme Court. The Petition was denied on March 30, 2009.

REASONS FOR GRANTING THE PETITION

The Fifth Amendment of United States Constitution grants every citizen the right to due process of law. The right to due process is applicable to the states by virtue of the Fourteenth Amendment. In *Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 68 L. Ed 254 (1921), this Court stated that the due process clause requires that every man have the protection of his day in court.

By granting HRO's motion for summary judgment, the lower courts denied Redstone due process of law by invidiously depriving it of its day in court with respect to the issue of when it knew of HRO's malpractice. The lower courts proceeded to make findings on two critical factual issues, granting summary judgment to HRO on the issue of the statute of limitations.

It should be noted that the procedure adopted by HRO and accepted by the lower courts did not comply with the Colorado Rules of Civil Procedure. C.R.C.P. 7(a) sets forth the "pleadings" allowed in a case: complaint,

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[5] This language of the Colorado Corporation Code has been in existence since 1994, well before the Dual officers and HRO structured the notes-for-stock transaction.

answer, reply to counterclaims, reply to cross claims, third party complaint, third party answer, and a reply to an affirmative defense. No other pleadings are allowed.

C.R.C.P. 12(a) requires that affirmative defenses must be presented in a "pleading" as defined in C.R.C.P. 7(a). The statute of limitations is an affirmative defense. The exceptions to the rule contained in C.R.C.P. 12(b) do not refer to a defense of the statute of limitation. HRO has never filed an answer in this case. Instead, HRO filed a motion for summary judgment alleging that there was no genuine issue of material fact with respect to the application of the statute of limitations. (See *Trujillo v. Farmers Insurance Exchange*, 862 P. 2d 962 (Colo. 1993).

An affirmative defense is not a proper subject for summary judgment:

> The Court notes that the District inappropriately advances its insufficient service of process and inadequate notice challenges in a motion for summary judgment rather than in a motion to dismiss or a responsive answer. A summary judgment is a ruling on the merits of the case predicated upon a determination that there are no material issues of fact that necessitate trial." *Prakash v. American University*, 234 U.S. App. D.C. 75, 727 F.2d 1174, 1181-82 (D.C. Cir. 1984). Improper service of process is not a defense to the merits of the plaintiff's lawsuit and thus cannot be the basis of a summary judgment motion . . .

Rather, "[a] Rule 12(b)(5) motion is the proper vehicle for challenging the mode of delivery or the lack of delivery of the summons and complaint." 5B C. Miller & A. Wright, Federal Practice & Procedure: Civil § 1353 (3d ed. 2006). . . .

The rationale for the delineation is important because the consequences of awarding summary judgment extend beyond the victory for the moving party, as a judgment on the merits has res judicata implications that prevent the claimant from pursuing the claim at a later time. *See Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980) ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." (citation omitted)). On the other hand, procedural challenges, such as a challenge made pursuant to a Rule 12(b)(5) motion to dismiss, do not invoke the same res judicata concerns for the claimant because a dismissal for insufficient service of process is not a disposition on the merits . . .

The District's submission has therefore been mislabeled and the Court will address the District's insufficient service of process and inadequate notice challenges under the framework that governs a 12(b)(5) motion to dismiss.

Cando v. District of Columbia, 242 F.R.D. 151, 158 (D. DC 2007). The statute of limitations is, like improper service, an affirmative defense that does not address the merits of plaintiff's claims. Unlike the Federal District Court in *Cando*, both the Denver District Court and the Colorado Court of Appeals treated HRO's motion as a motion for summary judgment, not a C.R.C.P. 12(b) motion to dismiss.

The trial court accepted HRO's motion for summary judgment on the issue of the statute of limitations. It then compounded the denial of due process to Redstone by striking Redstone's initial response and requiring that it file a response limited in length, in spite of Redstone's argument that a longer, more comprehensive response was necessary.

In its reply, HRO argued a completely new ground for the summary judgment, i.e. that the knowledge of the Dual Officers with respect to HRO's malpractice was to be imputed to the corporation. Redstone was denied the opportunity to present any evidence or argument in response to this new position of HRO because the trial court denied Redstone's request for leave to file a sur-reply or for oral argument as to that issue. As a result of the actions of HRO and the trial court, the only evidence in favor of Redstone considered by the trial court were the statements contained in its complaint and the severely redacted response to the motion for summary judgment.

Summary judgment may serve a useful purpose in expediting matters and saving resources, but it is not a substitute for a trial.

In determining whether to grant a motion for summary judgment, the court may look at all pleadings, affidavits, depositions, and other material. The moving party has the burden of showing that there are no genuine issues of material fact. All inferences that rise from the material reviewed must be decided in favor of the non-moving party.

In the instant matter, Redstone was deprived of its opportunity to adequately oppose the motion for summary judgment by the trial court's rulings limiting the length of the response, denying oral argument, and denying a sur-reply. There was no answer pleading the statute of limitations or imputation of knowledge via one of the wrongdoers. The motion for summary judgment was filed at the start of the proceedings, before there had been any discovery by either party.

> In many recent cases, where motive, intent, subjective feelings and reactions, consciousness and conscience were to be searched, and examination and cross-examination were necessary instruments in obtaining the truth, we have pointed out that and why the issues may not be disposed of on summary judgment.

Alabama GSR Co. v. Louisville & N.R. Co., 224 F.2d 1, 5 (5th Cir. 1955)). Issues of credibility and inference are not proper considerations for summary judgment). *Sarsha v. Sears Roebuck & Co.*, 3 F.3d 1035 (7th Cir. 1993)). As the Seventh Circuit states summary judgment is not the appropriate vehicle for judging "swearing contests between the parties." (*Payne v.*

Pauley, 337 F. 3d 767, 770 (7th Cir. 2003)). "On summary judgment a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder."

These considerations are particularly evident in this case. The primary issue with respect to the statute of limitations is at what point Redstone (through its Board of Directors) knew or should have known with reasonable diligence that HRO breached its duties to Redstone. Further, Redstone claims HRO violated its fiduciary duty to Redstone in structuring the notes-for-stock transaction, as well as misrepresenting the legality and nature of the transaction to Redstone's board of directors, in a conspiracy with the Dual Officers to commit fraud on the corporation. As a direct result of the management agreement between Redstone and PRC, the facts relating to the representation of Redstone by HRO are particularly in the knowledge of HRO and the Dual Officers. As there has been no discovery in the case, Redstone does not have access to the details of HRO's communication with the Dual Officers with respect to the notes-for-stock transaction.

Neither the trial court nor the appellate court in this matter addressed the fact that there are genuine issues of material fact relating to when Redstone knew or should have known of its claims against HRO. In violation of Redstone's procedural and substantive due process rights, each court made its *own* findings of fact (or generated impermissible inferences from facts in favor of HRO) as to what Redstone knew and when it first obtained the knowledge of the harmful conduct engaged in by HRO against it.

In a medical malpractice case, *Rouschberger v. Radetsky*, 745 P. 2d 640 (Colo. 1987), the Colorado Supreme Court made it clear that summary judgment is not proper with respect to the issue of when plaintiff knew of the claim:

> In this case, the trial court concluded as a matter of law that the Petitioners knew of or by the exercise of reasonable care should have discovered the commission of the alleged negligence in 1975 when one of the Petitioners expressed concerns to Radetsky that he might be prescribing medication improperly for Rauschenberger. However, the question of **whether a party discovered or reasonably should have discovered an injury caused by another's negligence in most circumstances involves determination of questions of fact to be made by the fact-finder rather than by the trial judge** (citations omitted) . . .
>
> Summary judgment is appropriate only if the pleadings and supporting documents demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." C.R.C.P. 56(c). The burden is on the moving party to establish that no genuine issue of fact exists, and any doubts in this regard must be resolved against the moving party (citations omitted).

(Emphasis added).

Similarly, in *Robert v. American Family Insurance*, 144 P. 3d 546, 548, (Colo. 2006), the court held:

> Although summary judgment may be a useful way of expediting matters and saving valuable resources, it is not a substitute for trial (citation omitted). Because a grant of **summary judgment denies** the party opposing the motion a right to trial, it is appropriate only where there is no role for the fact finder to play and where the controlling law entitles one party or the other to a judgment in its favor.

Colorado courts have denied Redstone due process of law. The courts granted summary judgment on different grounds, but each made findings of material fact (calling them "undisputed") as to what Redstone knew and when it knew it.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the United States Supreme Court grant its review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE COLORADO COURT OF APPEALS DATED MAY 15, 2008

COLORADO COURT OF APPEALS

Court of Appeals No.: 06CA2665
City and County of Denver District Court
No. 06CV2895
Honorable Michael A. Martinez, Judge

Redstone Resources, Inc., a Colorado corporation,

Plaintiff-Appellant,

v.

Holme, Roberts & Owen, LLP and Phillip Clark,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division II
Opinion by: JUDGE CARPARELLI
Rothenberg and Bernard, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: May 15, 2008

Plaintiff, Redstone Resources, Inc. (Redstone), appeals the trial court's grant of summary judgment for the defendants, Holme Roberts & Owen, LLC (HRO) and Phillip Clark, on statute of limitations grounds. We affirm.

Appendix A

I.

Non-party Preston Reynolds & Company (PRC) sold gas interests to Redstone. As part of the sale, PRC and Redstone agreed that PRC would provide officers and employees for Redstone and have the ability to exercise operational control over Redstone. Under the agreement, four officers of PRC also served as officers of Redstone. Three of them, Eric Szaloczi, Michael Batzer, and Roland DeBruyn (the option-holders), had stock options.

In 1999, PRC retained Clark, a partner at HRO, as counsel for PRC and Redstone. Clark structured Notes-for-Stock transactions (stock transactions) under which Redstone sold, and each of the three option-holders purchased, Redstone stock. Redstone later cancelled the sales.

The option-holders filed suit in Denver District Court in *Szaloczi v. Redstone Resources, Inc. (Szaloczi* litigation) to enforce their options. Redstone filed counterclaims for, among other things, breach of fiduciary duty, breach of contract, breach of duty of care, fraud, and conversion against the option-holders, its former CFO, and PRC. About forty-one months into the *Szaloczi* litigation, Redstone attempted to join HRO and Clark as parties, but the court denied the joinder. In February 2004, the court ruled that the option-holders did not breach their duty to Redstone. Redstone filed for bankruptcy on March 12, 2004.

Appendix A

On March 10, 2006, Redstone filed a complaint against HRO and Clark, alleging breach of fiduciary duty, aiding and abetting breach of fiduciary duty, negligent misrepresentation, fraud, and conspiracy. Redstone did not assert a claim for negligent professional services.

HRO moved for summary judgment, stating that the limitation periods expired before Redstone initiated the bankruptcy proceedings. Redstone argued that bankruptcy provisions should be applied to extend the statutory limitation periods. The trial court granted HRO's motion.

II.

Redstone contends that the trial court erred when it concluded that the statute of limitations barred its suit against HRO and Clark and granted summary judgment. We disagree.

We review de novo a trial court's rulings on motions for summary judgment or dismissal on statute of limitations grounds. *See Morrison v. Goff*, 91 P.3d 1050 (Colo. 2004); *Palisades Nat'l Bank v. Williams*, 816 P.2d 961 (Colo. App. 1991).

Appendix A

A.

Redstone's claims are premised on the following essential allegations:

1. Clark and HRO served as legal counsel to both PRC and Redstone.

2. There was a conflict of interests between PRC and Redstone.

3. The stock transactions were contrary to Colorado law, Redstone's corporate requirements, and Redstone's lending agreement with BankOne.

4. Clark and HRO breached fiduciary duties they owed Redstone as its attorneys when they did not (a) identify the foregoing problems, (2) advise Redstone about them, and (3) ensure that the stock transactions were proper and were not detrimental to Redstone.

5. As a result of Clark's and HRO's errors, BankOne declared Redstone in default in March 2000, Redstone was forced to obtain an alternative loan, Redstone cancelled the Notes-for-Stock transactions in April 2000, the option-holders sued Redstone on July 25, 2000, and Redstone was forced to declare bankruptcy.

Appendix A

B.

Redstone had three independent directors, John Behrmann, Robert Topol, and Jay Crist. In the course of this litigation, Redstone submitted the affidavit of John Behrmann, who, among other things, stated:

> 3. From mid-1999 until January 2000, I understood HRO acted as [Redstone's] general counsel and performed legal services for it. Phillip Clark was the HRO lawyer working with [Redstone] as client.
>
> 4. In June 1999, Redstone's Chief Financial Officer, Robert Pfeiffer [the CFO], proposed that Redstone adopt a program under which [the option-holders] could exercise their Redstone stock options to obtain stock by providing non-recourse notes to [Redstone] secured only by the stock itself.
>
> . . . .
>
> 6. As part of this program, I repeatedly told [the CFO] and Mr. Szaloczi that the members of [Redstone's] Board who were not personally interested in the program, i.e. Jay Crist, Robert Topal and myself, must review the Notes-for-Stock documents before execution because the other Board members, [Szaloczi and DeBruyn] had personal financial interests in this issue.

7. On several occasions, I directed [the CFO] to obtain the advice of Colorado legal counsel to determine whether the Notes-for-Stock program was valid under Colorado law. I confirmed with Mr. Szaloczi that Redstone's lawyer would determine that non-recourse notes could be used to buy stock under Colorado law. [The CFO] confirmed that he had counsel review the program and concluded it was valid. I understood at that time that HRO was the counsel who reviewed the Notes-for-Stock program.

8. At the time, I also understood that [the CFO] had HRO prepare the documents used to effectuate the Notes-for-Stock program. Eric Szaloczi also informed me that the lawyers were drafting the Notes-for-Stock documents.

9. On September 21, 1999, [the CFO] sent a notice to the [Redstone] shareholders informing them that the [Redstone] Board had already unanimously approved loans in connection with the Notes-for-Stock program. On receiving this notice, I reiterated my request to review these documents because of [the option-holders'] potential conflict of interest. Shortly thereafter, [the CFO] forwarded unsigned drafts of the Notes-for-Stock documents to me.

10. I later forwarded comments to [the CFO] regarding changes to those documents. . . .

Appendix A

. . . .

12. In November I was sent documents that had been amended generally consistent with my comments and were signed. I understood at the time that HRO made these changes to the documents they had earlier prepared. . . .

13. During the [f]all of 1999, I believe [sic] that HRO was representing Redstone, particularly in connection with completing the Notes-for-Stock program. I relied on this attorney-client relationship as the basis for my actions as a Redstone director at that time. I was confidant [sic] HRO was providing competent legal advice and protecting Redstone's interests, as its counsel, on the validity of this program.

Redstone submitted a similar affidavit from Robert Topol, which, among other things, stated:

4. [The CFO] confirmed that he had Redstone's counsel review the Notes-for-Stock Program and concluded it was valid. I understood at the time that HRO was the counsel who reviewed the Notes-for-Stock Program and prepared the documents necessary to complete the program.

6. During the fall of 1999, I believed that Redstone was being represented by competent legal counsel, particularly in connection with completing the Notes-for-Stock Program. I

relied on this attorney-client relationship as the basis for my actions as a Redstone director at that time. I was confident HRO was providing competent legal advice and protecting Redstone's interests, as its counsel, on the validity of this program.

C.

In addition to these affidavits, the record includes the following:

- Written consent in lieu of a board of directors meeting, dated effective as of June 15, 1999, signed by directors Behrmann and Topol, authorizing non-recourse loans to the option-holders for the purpose of exercising existing stock options;

- A July 16, 1999 letter from Behrmann to Szaloczi stating that he was expecting "the lawyer" to tell Redstone whether, under Colorado corporate law, someone can pay for stock with a non-recourse note;

- A letter to Redstone shareholders from the CFO stating that Redstone's board of directors had unanimously approved a loan program to the option-holders that would facilitate the exercise of existing stock options they held, subject to appropriate documentation;

Appendix A

- Minutes of an October 1999 Redstone special shareholders meeting at which the board discussed the "option and loan program term sheet";

- An October 1999 letter from Behrmann to Redstone's board and the CFO referring to the CFO's September 21, 1999, letter, saying he had received the loan documentation, reviewed it, and assuming the documents were in compliance with Colorado law, had made comments, which the letter then described;

- Minutes of a Redstone special shareholders meeting at which the shareholders voted to remove Szaloczi and DeBruyn from the board of directors;

- Written consent in lieu of a board of directors meeting, dated effective as of December 17, 1999, appointing Brega & Winters as corporate counsel;

- A December 23, 1999, letter to an attorney for one of Redstone's shareholders from Brega & Winters, stating, "This law firm is now outside counsel to Redstone due to the conflict of interests arising from former counsel for Redstone also representing [PRC]";

- Minutes of a January 2000 meeting of the Redstone board stating, "Approval of the Stock

Option/Loan Agreement documents was deferred to a future date. The board wants to review the original Stock Option Plan and seek legal opinion on the validity of the transaction from a Colorado Corporate Law perspective"; and

- An October 2001 letter from Redstone's expert witness to Brega & Winters stating opinions based on a review of documents dated no later than May 2000, including that the stock transactions were analogous to paying for the shares with bad checks.

In addition to the foregoing, it is undisputed that Redstone filed counterclaims against the option-holders in the *Szaloczi* litigation for, among other things, breach of fiduciary duty and fraud.

D.

Negligent misrepresentation and civil conspiracy (Third and Sixth Claims for Relief) have a two-year statute of limitations. § 13-80-102(1)(a), (i), C.R.S. 2007.

1.

For its misrepresentation claim, as supported by its specific factual allegations, Redstone alleged that HRO and Clark gave false information about whether the stock transactions complied with Colorado law and Redstone's corporate documents. It also alleged that

HRO and Clark provided this information to guide Redstone in its business transactions, knowing that Redstone would rely on it. Redstone alleged further that, as a consequence of these misrepresentations, HRO and Clark were liable for Redstone's pecuniary losses and damages proximately caused by its justifiable reliance on the misrepresentations.

A cause of action for misrepresentation accrues *on the date the misrepresentation is discovered or should have been discovered by the exercise of reasonable diligence.* § 13-80-108(3), C.R.S. 2007.

Based on the undisputed facts, we conclude that Redstone discovered or should have discovered Clark's and HRO's alleged negligent misrepresentations not later than April 2000 when it cancelled the transactions based on its conclusion that the transactions were unlawful and contrary to its corporate requirements. Accordingly, the statute of limitations for its negligent misrepresentation claim expired not later than April 2002.

2.

For its civil conspiracy claim, as supported by its specific factual allegations, Redstone alleged that HRO and Clark agreed with the option-holders and the CFO to accomplish unlawful goals through unlawful means, including breaching their fiduciary duties; performed at least one unlawful act to accomplish lawful or unlawful goals or at least one lawful act to accomplish an unlawful

goal; did so in furtherance of their conspiracy; and proximately caused damages and losses to Redstone.

No right of action in a civil conspiracy case accrues until damages are sustained. *Morrison v. Goodspeed*, 100 Colo. 470, 482, 68 P.2d 458, 464 (1937). A plaintiff's claim accrues when the plaintiff knew or should have known of the relevant injury and its cause. *Morrison*, 91 P.3d at 1057.

Based on the undisputed facts, we conclude that Redstone discovered or should have discovered Clark's and HRO's alleged civil conspiracy not later than August 2000 when it filed its counterclaims in the *Szaloczi* litigation. Accordingly, the statute of limitations for its civil conspiracy claim expired not later than August 2002.

E.

Breach of fiduciary duty (First Claim for Relief) and aiding and abetting breach of fiduciary duty (Second Claim for Relief) have a three-year statute of limitations. § 13-80-101(1)(f), C.R.S. 2007. A cause of action for breach of fiduciary duty accrues *on the date the breach is discovered or should have been discovered by the exercise of reasonable diligence.* Section 13-80-108(6), C.R.S. 2007; *Eads v. Dearing*, 874 P.2d 474, 478 (Colo. App. 1993).

Based on the undisputed facts, we conclude that Redstone discovered or should have discovered Clark's

and HRO's alleged breaches of fiduciary duties not later than April 2000 when it cancelled the transactions based on its conclusion that they were unlawful and contrary to its corporate requirements. Accordingly, the statute of limitations for its civil conspiracy claim expired not later than April 2003.

We conclude that Redstone discovered or should have discovered Clark's and HRO's alleged aiding and abetting the alleged breaches of fiduciary duties of the option-holders, the CFO, and PRC not later than August 2000, when it asserted its counterclaims in the *Szaloczi* litigation. Consequently, the statute of limitations for Redstone's fraud claims expired not later than August 2003.

F.

Fraud and constructive fraud (Fourth and Fifth Claims for Relief) also have a three-year statute of limitations. § 13-80-101(1)(c), C.R.S. 2007. A cause of action for fraud accrues *on the date the fraud is discovered or should have been discovered by the exercise of reasonable diligence.* Section 13-80-108(3);

We conclude that Redstone discovered or should have discovered Clark's and HRO's alleged fraud not later than August 2000, when it asserted its counterclaims in the *Szaloczi* litigation.

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G.

We reject Redstone's argument that its claims did not accrue until May 2003 when it obtained documents from HRO and deposed Clark.

Redstone argues, in part, that Clark structured the transactions in various ways that benefited the option-holders at its expense. However, the structure of the transactions is reflected in documents that were in Redstone's possession no later than 2000, review of which caused Redstone to cancel the transactions in April 2000. It also argues that Clark proceeded with the transactions even though they violated Colorado law and Redstone's corporate documents. Once again, however, Redstone should have, and did, discover these violations from the transaction documents not later than 2000.

Redstone argues further that Clark and HRO did not consult with Redstone's board regarding the structure of the transactions, did not respond to Behrmann's September 1999 inquiry about whether the transactions complied with state law, and did not advise Redstone regarding the various problems with the transactions. However, Redstone's own documents, including meeting minutes, consents in lieu of meetings, letters, and the affidavits of Behrmann and Topol, show that Redstone's independent board members (1) knew whether Clark and HRO had communicated with them regarding these matters; (2) knew that there were conflicts of interest between PRC, the option-holders, and Redstone; and (3) knew that Clark and HRO did

not advise them directly that Redstone should get separate counsel because of the conflicts. Much of this is reflected in Redstone's corporate documents and the affidavits of directors Behrmann and Topol.

Thus, contrary to Redstone's argument, the record demonstrates that each of its claims against Clark and HRO accrued before it took Clark's deposition.

H.

A bankruptcy trustee has two years after the bankruptcy is adjudicated to make any claim that was not barred when the bankruptcy petition was filed. 11 U.S.C. § 108(a) (2006).

Here, we conclude that the statute of limitations for each of Redstone's claims against HRO and Clark expired before it filed for bankruptcy in March 2004.

III.

Redstone also contends that Clark's and HRO's failure to disclose details about the stock transactions impeded its ability to discover the facts necessary to bring its current claims, equitably tolling the statute of limitations. We disagree.

A.

Tolling delays the start of the limitations period. Tolling is appropriate when "extraordinary

circumstances" or "wrongful conduct" prevented a party from filing a claim. *Morrison*, 91 P.3d at 1053. The determination of when a claim accrues hinges on each plaintiff's "specific knowledge of relevant facts," and courts must determine when each party "knew or should have known of the relevant injury and its cause." *Morrison*, 91 P.3d at 1056. Also, the mere presence of unresolved, pending litigation does not equitably toll the statute of limitations. *Poleson v. Wills*, 998 P.2d 469 (Colo. App. 2000).

B.

It is undisputed that, on March 28, 2000, Redstone knew that the Notes-for-Stock program caused its lender to declare the default on Redstone's loan. Equitable tolling is inappropriate here, because, as the court stated in the *Szaloczi* litigation, "What [Redstone] needed to know was that [HRO] represented [the option-holders]. HRO represented [Redstone]. HRO gave advice that helped [the option-holders] and not [Redstone]. I mean once you know those things, I think you know enough."

The mere fact that Clark refused to disclose details to Redstone about the Notes-for-Stock transaction until 2003, when the trial court found that Clark and Redstone had an attorney-client relationship, did not prevent Redstone from filing a separate lawsuit against HRO and Clark within the limitations period. Therefore, we conclude that equitable tolling is inappropriate and that Redstone's claims accrued not later than August 2000.

IV.

Because we conclude that the statute of limitations had already run before the bankruptcy provisions applied, we need not address the other issues on appeal.

The judgment is affirmed.

JUDGE ROTHENBERG and JUDGE BERNARD concur.

APPENDIX B — ORDER OF THE DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO DATED NOVEMBER 14, 2006

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case Number: 06 CV 2895
Ctrm: 9

Plaintiffs: REDSTONE RESOURCES, INC., a Colorado corporation

v.

Defendants: HOLME ROBERTS AND OWEN, LLC and PHILLIP CLARK

ORDER

THIS MATTER is before the Court on Defendants' Holme, Roberts, and Owen, and Phillip Clark (together "Defendants") Motion for Summary Judgment pursuant to C.R.C.P. 56(h). After reviewing the Motion, Plaintiff Redstone Resources' ("Plaintiff") Response, Defendants' Reply, and all other relevant documents, the Court makes the following findings and order.

In the Complaint, Plaintiff asserts the following claims against Defendants:

1. Defendants breached their fiduciary duty to the Plaintiff as contained within their attorney client relationship. Defendants had the duty to

ascertain actual and potential conflicts of interest between Preston Reynolds & Co. ("PRC") and Plaintiff. Defendants disregarded this duty, and continued to provide legal counsel to PRC to the detriment of Plaintiff. Defendants' actions and omissions have proximately caused Plaintiff to incur damages and losses to be determined at trial. (Plaintiff's First Claim for Relief).

2. Defendants aided and abetted dual Officers of PRC and Plaintiff who performed wrongful acts, and breached their fiduciary duty to Plaintiff. Particularly, Defendants' assistance in the Notes-for-Stock program contributed to the Officers breaching their duty, resulting in injuries and damages to Plaintiff. (Plaintiff's Second Claim for Relief).

3. Defendants engaged in negligent misrepresentation by giving false information regarding the Notes-for-Stock transactions to the Officers knowing that the Officers would then supply the faulty information to Plaintiff. Plaintiff relied on the information, resulting in pecuniary losses and damages. (Plaintiff's Third Claim for Relief).

4. Defendants engaged in fraud or deceit by making false representations and concealing or failing to disclose material facts. Defendants made false representations regarding the

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Notes-for-Stock transaction and concealed information that they were structuring the Notes-for-Stock transaction as the functional equivalent of an extension of Individual Counterdefendants stock option agreements. Plaintiff relied on the false information and on the assumption that the concealed information did not exist or was different. Consequently, Defendants' actions proximately caused Plaintiff to incur damages and losses to be determined at trial. (Plaintiff's Fourth Claim for Relief).

5. Defendants engaged in constructive fraud by breaching their duty to Plaintiff. Defendants' actions were fraudulent because they were deceitful and injured public interest. Additionally, Defendants' confidential and fiduciary relationship with Plaintiff afforded Defendant the power and means to take advantage of Plaintiff, resulting in constructive fraud and damages in an amount to be proved at trial. (Plaintiff's Fifth Claim for Relief).

6. Defendants engaged in conspiracy by agreeing with the Officers to accomplish unlawful goals including breaching their fiduciary duty. The Defendants and Officers reached a meeting of the minds, and took actions in order to accomplish the objectives of furthering their conspiracy. As a result, Plaintiff suffered damages and losses proximately caused by Defendant's conspiracy. (Plaintiff's Sixth Claim for Relief).

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STANDARD OF REVIEW

Summary judgment is proper under C.R.C.P. 56 if there is no genuine issue of material fact necessary for the determination of a question of law. Colo. R. Civ. P. 56(h) (2005); *Mehaffy, Rider, Windholz & Wilson v. Cent. Bank of Denver, N.A.*, 892 P.2d 230, 235 (Colo. 1995). The burden rests with the moving party to establish that there is no genuine issue of material fact in order to succeed on their motion. *Mehaffy*, 892 P.2d at 235. Once the moving party has met its burden by demonstrating there is no issue of material fact, the burden shifts to the non-moving party to establish the existence of a triable issue of material fact. *Greenwood Trust v. Conley*, 938 P.2d 1141 (Colo. 1997). Because summary judgment is a drastic remedy, any dispute as to the existence of facts must be considered in the light most favorable to the nonmoving party. *Mehaffy*, 892 P.2d at 235. Issues of credibility are not properly decided under C.R.C.P. 56, neither are factual disputes properly resolved under the rule. *Crouse v. Colo. Springs*, 766 P.2d 655 (Colo. 1988).

Additionally, C.R.C.P. 56 provides that in responding to a motion for summary judgment that is supported by the facts, the adverse party may not rely on his opposing party's allegations or denials in his pleadings, rather the adverse party must plead specific facts that support the conclusion that genuine issues of material fact exist. Colo. R. Civ. P. 56(e).

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STATEMENT OF UNDISPUTED FACTS

The following facts, as relevant here, are undisputed:

1. Plaintiff Redstone Resource, Inc. ("Redstone") was incorporated in Colorado on or about May 15, 1995 and is located at 1775 Sherman Street, Suite 1675, Denver, Colorado. (Amend. Compl. ¶ 13).

2. Defendant Phillip Clark is a lawyer licensed to practice in the State of Colorado since 1976, and is a partner at Holme, Roberts & Owen LLC (together "HRO"). (*Id.* at ¶ 6).

3. HRO is a limited liability company organized and existing under the laws of Colorado, with its principal place of business in Denver, Colorado. (*Id.* at ¶ 7).

4. In 1995, Preston Reynolds & Co. ("PRC") purchased gas interests and created an area of mutual interest with Quantum Energy, known as Rough Draw, located in Campbell County, Wyoming. (*Id.* at ¶ 10).

5. On or about October 1, 1995 PRC sold the before mentioned gas interests to Redstone. (*Id.* at ¶ 11).

6. As part of the sale, PRC and Redstone entered into a management agreement, in which PRC

would provide officers and employees for Redstone, and maintain the ability to exercise authority over all operational aspects of Redstone. (*Id.* at ¶ 11, 12).

7. Under the management agreement, several individuals acted in the capacity as officers for both Redstone and PRC. (*Id.* at ¶ 29).

8. By January of 1999, various conflicts emerged between Redstone and PRC. (*Id.* at ¶ 35).

9. By June 1999, HRO had been retained by PRC in order to provide legal counsel for PRC and Redstone. (*Id.* at ¶ 54).

10. One of the transactions which HRO was asked to address involved the creation of a Notes-for-Stock arrangement between Redstone and certain individuals who acted as officers for both PRC and Redstone ("Officers"). (Mot. For Sum. Judgment pg. 2).

11. On or about December 13, 1999, Redstone hired Brega & Winters, P.C. to serve as independent legal counsel. (*Id.* at pg. 3).

12. Redstone's board canceled the Promissory Notes for Stock Certificates issued as part of the Notes-for-Stock plan, and on April 14, 2000, cancelled these loan transactions and the related stock certificates. (Amend. Compl., at ¶ 115, 116).

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13. On July 25, 2000, the Officers brought suit to enforce their options regarding the before mentioned Notes-for-Stock plan in *Szaloczi v. Redstone Resources, Inc.*, Case No. 00CV4682 (Colo. Dist. Ct.). (Mot. For Sum. Judgment pg. 4).

14. HRO initially represented PRC with respect to counterclaims brought by Redstone, but was disqualified on motion by Redstone on January 11, 2003. (*Id.*).

15. In the prior litigation, Redstone brought counterclaims against the Officers alleging breach of fiduciary duty, breach of contract, breach of duty of care, rescission, and conversion. (Redstone's First, Second, Third, Fourth, and Fifth claims for relief, Third Amend. Comp. *Szaloczi v. Redstone Resources, Inc.*, Case No. 00CV4682 (Colo. Dist. Ct.)).

16. Redstone attempted to join HRO as a co-defendant in its counterclaims against PRC, but Redstone's motion for joinder was denied by the court on November 10, 2003. (Amend. Compl. *Id.*).

17. On February 6, 2004, Denver District Court ruled that the Notes-for-Stock transaction was fair and the Officers did not breach their fiduciary duties. (Def. Reply Exhibit A).

18. On March 12, 2004, Redstone filed for chapter 11 bankruptcy in the United States Bankruptcy Court. (*Id.*).

19. On March 10, 2006, Redstone filed suit against HRO for various forms of malpractice. (Compl.).

The Court has reviewed Defendant's Motion, Plaintiff's Response, Defendant's Reply, the Court file, and all relevant authorities. Being sufficiently advised, the Court concludes as follows:

Summary judgment is proper under C.R.C.P. 56 if there is no genuine issue of material fact necessary for the determination of a question of law. Additionally, where it is shown that the plaintiff discovered, or reasonably should have discovered the alleged tortious conduct as of a particular date, the statute of limitations issue may be decided as a matter of law. *Colburn v. Kopit*, 59 P.3d 295, 297 (Colo. App. 2002).

Under Colorado law, "the statute of limitations for an action against an attorney for legal malpractice commences to run at the time the client discovers, or through the use of reasonable diligence, should have discovered, the negligent act of the attorney." *Jacobsen v. Shine*, 859 P.2d 911, 913 (Colo. App. 1993). Malpractice claims accrue when the plaintiff knows the facts underlying the claims, not necessarily the specific legal theories that could be pled or argued. *Colburn* 59 P.3d at 297. Rather, the most that is required is that some damages have been sustained, so that the claimants

know that they have a claim for some amount. *Palisades Nat'l Bank v. Williams,* 816 P.2d 961 at 963 (Colo. App. 1991).

1. *Knowledge of any alleged negligence on behalf of the Defendant was imputed to Redstone by its Officers by November of 1999.*

Under Colorado law, knowledge of an officer or agent is imputed to the corporation. *Bock v. American Growth Fund Sponsors, Inc.,* 904 P.2d 1381, 1384 (Colo. App. 1995). However, knowledge is not imputed if the officer or agent has an interest adverse to the corporation or is committing a fraud on the corporation. *Id.*

In the present case, it is undisputed that Defendant's advised Redstone's Officers in the Notes-for-Stock transaction. (Amend. Compl. ¶ 29). The Officers were aware of the possible conflicts between Defendants and Plaintiff as late as November of 1999, as illustrated by the memo written by Mr. Szaloczi advising Redstone to obtain independent legal counsel. (Def. Mot. for Sum. Judgment Exhibit A). The memo states in pertinent part:

> The Company [Redstone] and [Preston Reynolds] have shared one set of lawyers in the past which has worked out well and been cost effective. But with this contentious issue of removing directors, I believe it is time for the Company to find independent legal counsel to represent it. The issue from this

> point forward includes those of board fiduciary duty and already there have been threats of a lawsuit from one shareholder. *Id.*

As an Officer of Redstone, Mr. Szaloczi discovered, or through the use of reasonable diligence should have discovered, any possible negligent acts or acts of possible misrepresentation. Therefore, the Officers' knowledge of any possible tortious conduct of the Defendant was imputed to Redstone by November of 1999, absent any findings that the Officers engaged in fraudulent or adverse conduct towards Redstone.

The issue involving the conduct of the Officers was previously addressed in *Szaloczi v. Redstone Resources, Inc.*, Case No. 00CV4682 (Colo. Dist. Ct.). In the *Szaloczi* litigation, Redstone brought counterclaims against the Officers alleging breach of fiduciary duty, breach of contract, breach of duty of care, rescission, and conversion. (Redstone's Third Amend. Compl. *Szaloczi v. Redstone Resources, Inc.*, Case No. 00CV4682 (Colo. Dist. Ct.). In the February 6, 2004 hearing, the trial court ruled as follows:

> The next issue that Mr. Bain has relates to fiduciary duties. Now, I think that goes hand in hand with the requirement that, where there are conflicts of interest, that the transaction has to be fair, so I think the next thing for the Court to do is undertake a fairness analysis.

> The heart of the transaction was simply that they essentially, by being willing to pay interest payments, were going to get some more time to pay for their — to exercise their stock options, and everyone knew that was the nature of the transaction. There's nothing the Court can think of that's just inherently unfair about that. (Defendants' Exhibit A).

Consequently, the *Szaloczi* Court issued a judicial determination that the same Notes-for-Stock transaction presently at issue before this Court was fair, and that the officers did not breach their fiduciary duty. *Id.* Based on that judicial determination, it cannot be said that the Officers were precluded from imputing their knowledge as a result of fraud or actions adverse to Redstone.

2. *The statute of limitations had expired prior to Plaintiff's bankruptcy filing, resulting in the expiration of Plaintiff's current claims against Defendant.*

Actions sounding in either breach of fiduciary duty or fraud must be commenced within three years after the cause of action accrues. Colo. Rev. Stat. § 13-80-101(c) and (f). Negligent misrepresentation actions must be commenced within two years of the cause of action accruing. Colo. Rev. Stat. § 13-80-102(1)(a). Civil Conspiracy is subject to a two year statute of limitations from the time of accruement. Colo. Rev. Stat. § 13-80-102(1)(i).

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Plaintiff's Officers discovered, or should have discovered any possible negligent acts of the Defendants by November of 1999. Therefore, the statute of limitations expired on the Plaintiff's Third and Sixth claim as late as November 2001. Colo. Rev. Stat. § 13-80-102(1)(a); 13-80-102(1)(i). Additionally, the statute of limitations expired on the Plaintiff's First, Second, Fourth, and Fifth claims as late as November 2002. Colo. Rev. Stat. § 13-80-101(c) and (f).

Consequently, the statute of limitations expired on all claims prior to Plaintiff's Bankruptcy filing on March 12, 2004. If applicable nonbankruptcy law fixes a period within which the debtor may commence an action, and such period has not expired before the date of filing of the petition, the trustee may commence such action only before the later of the end of such period; or two years after the order for relief. 11 U.S.C. § 108(a). As such, the Plaintiff's bankruptcy filing occurred after the statute of limitations had expired on their claims against Defendants. Therefore, Plaintiffs are not afforded the two year time extension provided by bankruptcy law.

CONCLUSION

Summary judgment is proper under C.R.C.P. 56 because there is no genuine issue of material fact necessary for the determination of a question of law. First, the knowledge of Redstone's Officers regarding the alleged misrepresentation of the Defendant was imputed to Redstone. On review of the record, the Court notes that a judicial determination was issued

exonerating the Officers, the Notes-for-Stock transaction was determined to be fair, and the Officers were awarded damages stemming from the transaction. *Szaloczi* Case No. 00CV4682 (Colo. Dist. Ct.). As such, the Officers were found to not have breached their fiduciary duty, or to have acted adversely towards Redstone.

Second, the Officers of Redstone discovered, or through the use of reasonable diligence should have discovered, the alleged negligent act of the Defendants by November of 1999. This is evident by Mr. Szaloczi's memo expressing his concern over Defendants' continued representation of both PRC and Redstone. Therefore, the statute of limitations had expired on Plaintiff's claims as late as November of 2001 and 2002. Consequently, Defendants' motion for summary judgment regarding Plaintiff's First, Second, Third, Fourth, Fifth, and Sixth claims for relief is GRANTED.

Based on the foregoing HRO's Motion for Summary Judgment is GRANTED with respect to:

1. Redstone's First Claim for Relief
2. Redstone's Second Claim for Relief
3. Redstone's Third Claim for Relief
4. Redstone's Fourth Claim for Relief
5. Redstone's Fifth Claim for Relief
6. Redstone's Sixth Claim for Relief

DATED THIS 14th DAY OF NOV., 2006.

BY THE COURT

s/ Michael A. Martinez
Michael A. Martinez
District Court Judge

APPENDIX C — ORDER OF THE COLORADO SUPREME COURT DENYING PETITION FOR WRIT OF CERTIORARI EN BANC DATED MARCH 30, 2009

COLORADO SUPREME COURT

No. 08SC500

Court of Appeals Case No. 06CA2665

Petitioner:

Redstone Resources, Inc., a Colorado corporation,

v.

Respondents:

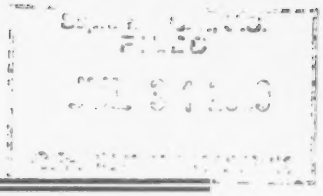
Holme, Roberts & Owen, LLP; and Phillip Clark.

Petition for Writ of Certiorari DENIED. EN BANC.

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(2)

No. 09-13



In the Supreme Court of the United States

REDSTONE RESOURCES, INC.,
Petitioner,

v.

HOLME ROBERTS & OWEN LLP; and PHILLIP CLARK,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE CASE AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Redstone Resources, Inc. Respondents are Holme Roberts & Owen LLP and Phillip Clark.

Respondent Holme Roberts & Owen LLP has no parent corporation and no publicly held company owns 10% or more of its stock.

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RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to Sup. Ct. R. 15, the Respondents Holme Roberts & Owen LLP and Phillip Clark hereby submit this Brief in Opposition to the Petition for Certiorari.

STATEMENT OF THE CASE

This is a legal malpractice case under Colorado law. Respondents Holme Roberts & Owen LLP ("HRO") and Phillip Clark (collectively "Lawyers") provided legal services to Petitioner Redstone Resources, Inc. ("Redstone") in connection with certain stock transactions. (App. A to Pet. Cert., p. 2a, ¶ 3.)[1] After terminating the Lawyers as its counsel, Redstone lost a suit relating to those stock transactions, and subsequently filed for bankruptcy in 2004. (*Id.*)

Almost two years after filing for bankruptcy, Redstone sued the Lawyers, asserting Colorado common law claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, negligent misrepresentation and fraud and conspiracy relating to Lawyers' work on the stock transactions. (*Id.* at p. 3a, ¶ 1.) Lawyers moved for summary judgment on the grounds that the applicable statute of limitations on each claim had

[1] All citations to the Appendices refer to the Appendices accompanying Redstone's Petition for a Writ of Certiorari, Docket No. 09-13.

expired as a matter of law long before Redstone filed for bankruptcy. (*Id.* at ¶ 2.) The trial court agreed, and dismissed the claims. (App. B to Pet. Cert., p. 30b.) The Colorado Court of Appeals, after a *de novo* review of the undisputed facts in the record, affirmed the dismissal of the claims. (App. A, p. 17a.) The Colorado Supreme Court denied Redstone's petition for review on *certiorari*. (App. C to Pet. Cert.)

A. Reasons for Denying Redstone's Petition for Writ of Certiorari.

Redstone's Petition for Certiorari should be denied because there are no federal issues presented by this case. Specifically, this Court lacks jurisdiction of this case under 28 U.S.C. § 1257(a), which limits this Court to review of federal statutory or constitutional issues only. Moreover, Redstone cannot under any stretch of the imagination meet the standards for review in Sup. Ct. R. 10, which requires "compelling reasons" for the grant of a writ of *certiorari*. The Court should reject Redstone's tortured efforts to convert this garden-variety state law case into a federal constitutional matter, and deny the Petition for Certiorari.

1. The Court Lacks Jurisdiction Pursuant to 28 U.S.C. § 1257(a) Because This Case Presents No Federal Issues.

Redstone contends that this Court has jurisdiction over this case pursuant to 28 U.S.C. §

1257(a)[2], which allows review of final judgments rendered by the highest court of a State where "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . ." Because this case presents no federal statutory or constitutional issues, this Court does not have jurisdiction.

Redstone contends that the trial court's entry of summary judgment somehow amounted to a deprivation of its Fifth Amendment due process rights. Specifically, Redstone claims that "[b]y granting [Attorneys'] motion for summary judgment, the lower courts denied Redstone due process of law by invidiously denying it of its day in court with respect to the issue of when it knew of [Attorneys' alleged] malpractice." (Pet., p. 12.) In addition, Redstone claims that it was "deprived of its opportunity to adequately oppose the motion for summary judgment by the trial court's rulings limiting the length of the response, denying oral argument, and denying a sur-reply." (Pet., p. 16.) On the contrary, it is well-settled that where the facts are not in dispute, summary judgment may be entered dismissing a claim as time-barred. Furthermore, the reasonable limits imposed by the trial court on the length of Redstone's response to the motion, and its refusal to allow oral argument or

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[2] The Petitioner erroneously cites to the statute as 28 U.S.C. § 1257(1), instead of 28 U.S.C. § 1257(a).

permit the filing of an extra brief, are routine matters within the discretion of a court. The procedures employed by the Colorado courts in no way denied Redstone a full and fair opportunity to respond to Attorneys' motion for summary judgment. Accordingly, the Court should deny Redstone's Petition for Certiorari.

a. **Granting Attorneys' Motion for Summary Judgment Did Not Amount to a Violation of Redstone's Due Process Rights, as Statute of Limitations Issues Can Be Decided as a Matter of Law.**

Colorado law is clear that "where it is shown that the plaintiff discovered, or reasonably should have discovered, the alleged tortious conduct as of a particular date, the statute of limitations issue may be decided as a *matter of law*." *Colburn v. Kopit*, 59 P.3d 295, 297 (Colo. App. 2002) (emphasis added) (citing *Broker House Int'l, Ltd. v. Bendelow*, 952 P.2d 860, 863 (Colo. App. 1998)); *see Palisades Nat'l Bank v. Williams*, 816 P.2d 961, 963 (Colo. App. 1991) (holding that "[i]f the undisputed fact clearly show that a plaintiff discovered, or reasonably should have discovered, an attorney's negligent conduct as of a particular date, the issue may be decided as a matter of law.") (citing *Morris v. Geer*, 720 P.2d 994 (Colo. App. 1986)). The same rule applies elsewhere. *See, e.g., Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1143 (Cal. Ct. App. 1990) (finding that "summary judgment is proper where the facts show the action is time barred as a matter of law."); *AYH Holdings,*

Inc. v. Avreco, Inc., 826 N.E.2d 1111, 1133 (Ill. App. Ct. 2005) (reasoning that "[w]here it is apparent from the undisputed facts that only one conclusion can be drawn, the question becomes one for the court[,] and can be resolved as a matter of law, making summary judgment on statute of limitation[s] grounds appropriate.") (quoting *Castello v. Kalis*, 816 N.E.2d 782 (Ill. App. Ct. 2004)).[3]

Like *Colburn*, the undisputed facts here showed when Redstone discovered or reasonably should have discovered the alleged conduct giving rise to its potential claims. (App. B, p. 22b-25b.) Consequently, the trial court ruled that Redstone's claims had expired as a matter of law pursuant to the applicable statutes of limitations. Reviewing the record *de novo*, the Colorado Court of Appeals also concluded that there were no disputed issues of materials fact as to when Redstone discovered or should have discovered its alleged claims against

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[3] In its Petition, Redstone mischaracterizes the case of *Rauschenberger v. Radetsky*, 745 P.2d 640, 644 (Colo. 1987), alleging that the case stands for the proposition that "summary judgment is not proper with respect to the issue of when plaintiff knew of the claim." (Pet., p. 18.) However, in *Rauschenberger*, the court did not assert a blanket rule that discovery of claims could not be determined through motions for summary judgment. Instead, the court pointed out that in this particular instance there were genuine issues of material fact with respect to discovery of the claim, and therefore a motion for summary judgment on these issues was not appropriate. *Id.* That is not the case here. In this case, unlike *Rauschenberger*, undisputed facts confirm Redstone's discovery of the claims. Therefore, a motion for summary judgment with respect to this issue was appropriate.

Attorneys. These are routine decisions of state law that courts make every day, and these decisions in no way can be construed as a deprivation of due process of law under the Fifth Amendment.

b. This Case Involved Routine Application of Well-Established Principles of Law, and Therefore Does Not Trigger Fifth Amendment Due Process Issues.

Based on documents submitted by Redstone itself, the trial court was able to determine the date that Redstone's officers had knowledge of the alleged claims against Attorneys. (App. B, p. 26b.) It is a well-accepted principle of law that knowledge of an officer is imputed to the corporation unless the officer has an interest adverse to the corporation or is committing a fraud on the corporation. *Bock v. Am. Growth Fund Sponsors, Inc.*, 904 P.2d 1381, 1384 (Colo. App. 1995) (citing *Jones v. King Res. Co.*, 509 P.2d 814, 816 (Colo. App. 1973)); *Denver, S.P. & P.R. Co. v. Conway*, 5 P. 142, 147 (Colo. 1884). The exception clearly did not apply in this case because after a full trial in a separate lawsuit, the court found that the Redstone officers did not engage in fraud. (App. B, p. 27b-28b.) Therefore, pursuant to well-established principles of law, the officers' knowledge of the potential claims against Lawyers was imputed to the corporation, Redstone. *Bock*, 904 P.2d at 1384. The clock on Redstone's alleged claims began ticking when its officers discovered or reasonably should have discovered the alleged conduct giving rise to such claims. Therefore, the

statutes of limitations on Redstone's claims had expired long before it filed for bankruptcy.

The Court of Appeals affirmed the expiration of Redstone's claims, albeit on different grounds. Under Colorado law, a claim accrues when the plaintiff discovers the alleged claims or should have discovered the alleged claims by exercise of reasonable diligence. *See* COLO. REV. STAT. § 13-80-108(1) ("a cause of action for injury to person . . . shall be considered to accrue on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence."); Colo. Rev. Stat. § 13-80-108(3) ("[a] cause of action for fraud, misrepresentation . . . or deceit shall be considered to accrue on the date such fraud, misrepresentation, concealment, or deceit is discovered or should have been discovered by the exercise of reasonable diligence."); *Morrison v. Goff*, 91 P.3d 1050, 1053 (Colo. 2004) (ruling that a claim for legal malpractice accrues "when plaintiffs learn facts that would put a reasonable person on notice of the general nature of damage and that the damage was caused by the wrongful conduct of an attorney." (quoting *Broker House*, 952 P.2d at 863)). Reviewing the record *de novo*, the Court of Appeals applied these rules to undisputed facts to conclude that Redstone discovered or reasonably should have discovered the alleged conduct giving rise to the claims sometime in 2000. (App. A, p. 10a-13a.) Therefore, pursuant to the applicable statute of limitations, Redstone's claims had expired by the time it filed for bankruptcy.

This case presents no constitutional issues. In this case, the courts routinely applied well-established principles of law to undisputed facts to conclude that each of Redstone's claims had expired under the applicable statute of limitations. Such routine application of basic law did not deprive Redstone of its due process rights under the Fifth Amendment. As Redstone fails to meet the jurisdictional requirements for review under 28 U.S.C. § 1257(a), Redstone's Petition for Certiorari should be denied.

c. There Was No Deprivation of Its Fifth Amendment Due Process Rights Because Redstone Was Given More Than Sufficient Opportunity to Adequately Oppose the Motion for Summary Judgment.

Redstone argues that the trial court imposed procedural limitations that denied it the opportunity to adequately oppose Attorneys' motion for summary judgment. Specifically, Redstone complains about page limitations imposed by the trial court, as well as the trial court's refusal to hold oral argument or allow Redstone to file a sur-reply. Contrary to Redstone's contention, the record reflects that it had a full and fair opportunity to oppose the motion for summary judgment – in two courts – such that there was no deprivation of its due process rights under the Fifth Amendment.

Attorneys' motion for summary judgment in the trial court was 14 pages long. Redstone's initial response to the motion for summary judgment was

an astounding 52-pages long. The trial court struck Redstone's response because it exceeded the page limitations established under Colorado rules. Redstone re-submitted a brief consisting of 18 pages and 22 exhibits. Redstone also requested permission to file a sur-reply, but the trial court refused to permit further briefing. Pursuant to Colorado law, "a trial court has discretion to deny . . . [a] request to file a surreply . . ." *Olson v. State Farm Mut. Auto. Ins. Co.*, 174 P.3d 849, 860 (Colo. App. 2007) (citing *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164-65 (10th Cir. 1998)). Finally, Redstone requested that the court permit oral argument on the motion, but the court refused. Rule 121, § 1-15(4) of the Colorado Rules of Civil Procedure provides that "oral argument or an evidentiary hearing . . . may be allowed by the court at its discretion." Thus, Redstone was given all the opportunity to respond to the motion for summary judgment provided under Colorado law. The trial court's decision not to exercise its discretion to allow Redstone more opportunity than required by Colorado rules and practice does not amount to a deprivation of Redstone's due process rights.

Moreover, Redstone ignores that it had a further opportunity to present all its arguments in the Colorado Court of Appeals. In that court, which reviewed the grant of summary judgment *de novo*, Redstone not only filed an opening brief and a reply brief, but also participated in oral argument to the panel. Redstone made all the arguments it makes in this Court, namely that the summary judgment was inappropriate and that the trial court denied it a full

opportunity to present its case. The Court of Appeals carefully considered these arguments and rejected them in an unpublished opinion. There is thus no question that the Colorado courts afforded Redstone a full and fair opportunity to present its arguments before the claims were dismissed.

2. The Case Presents No Compelling Reasons for Review Pursuant to Sup. Ct. R. 10.

Pursuant to Sup. Ct. R. 10, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for *compelling reasons*." (emphasis added). Since this case on its face involves no federal issue, the only conceivable basis for review is Sup. Ct. R. 10(b) and (c), which provides for review where:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

As discussed previously, this case raises no federal statutory or constitutional issues. Therefore, there are no "compelling reasons" to justify granting Redstone's Petition for Certiorari, as Redstone undoubtedly fails to meet the standards for review pursuant to Sup. Ct. 10.

CONCLUSION

This case is nothing more than a routine application of state law, within a standard procedural framework, that quite literally occurs hundreds of time daily throughout this country. There are no federal issues presented. Thus, not only does this Court lack jurisdiction pursuant to 28 U.S.C. § 1257(a), but there are also no "compelling reasons" for review, as established under Sup. Ct. R. 10. For these reasons, Respondents respectfully request that the United States Supreme Court deny Redstone's Petition for Certiorari in this matter.

Respectfully submitted,

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